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Goh Hwa Kiang v Public Prosecutor

B HIGH COURT (TAIPING) — CRIMINAL REVISION NO AB-44–14–07 OF 2020
MUNIANDY JC
14 JUNE 2021

C *Criminal Procedure — Discharge not amounting to acquittal — Whether discharge not amounting to acquittal ('DNAA') ordered in appropriate circumstances — Accused remanded in custody pending trial since being charged with offences of possessing firearm and committing attempted murder as bail was not available for firearm offence — Prosecution had only called four witnesses and*
D *failed to complete case after more than two years since accused was charged — Trial was postponed numerous times on prosecution's request because its witnesses failed to attend court — Trial court granted DNAA when prosecution asked for final adjournment and accused asked for acquittal and discharge — Whether trial court*
E *erred in not acquitting accused as charges had been hanging over his head for more than two years — Whether prosecution could not give good reason why its witnesses failed to attend court or give assurance that it could close its case soonest — Whether DNAA was wrong order to be made as it caused serious miscarriage of justice to accused and subjected him to undeserved hardship*

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The accused (Goh Hwa Kiang) was charged in the sessions court in September 2018 for being in possession of a firearm and for committing attempted murder. Pending trial, he was remanded in custody as bail was not available for the firearms offence. Although s 172B(4) of the Criminal Procedure Code ('the
G CPC') required the trial of an accused to commence not later than 90 days from the date he was charged, in the instant case the trial was fixed to begin in April 2019 and actually started only in July 2019. Thereafter, it was adjourned several times at the request of the prosecution because its witnesses failed to turn up in court. After more than two years from the date the accused was
H charged, only four prosecution witnesses had testified and the prosecution's case was far from closure. When, at the last trial date on 13 July 2020, the prosecution again asked for a final postponement because its witnesses were not in court and subpoenas for their attendance had not been issued, the accused's counsel objected and applied for an acquittal and discharge. The trial judge,
I however, granted the accused a discharge not amounting to an acquittal ('DNAA'). Since the DNAA was not a final order, and therefore not appealable, an application was made to the High Court to exercise its revisionary powers over the decision pursuant to s 323 of the CPC read together with ss 31 and 35 of the Courts of Judicature Act 1964.

Held, setting aside the DNAA and acquitting and discharging the accused: A

(1) The trial judge had exercised his discretion improperly in not acquitting the accused when discharging him. By doing so, the judge had misdirected himself on the law and the facts of the case. The trial judge had failed to consider that the charges had been hanging over the B accused's head for more than two years during which time he had been remanded in custody; that the trial had been adjourned numerous times because of non-attendance of prosecution witnesses without any cogent reason being given for their absence and the prosecution was still far from closing its case. On the facts and circumstances, the trial judge's decision C to order a DNAA was incorrect, illegal and improper and resulted in a miscarriage of justice which prejudiced the accused and caused him undeserved hardship. The inordinate delay in the accused's prosecution amounted to a vexatious prosecution. Public interest demanded that an accused should be prosecuted fairly and speedily, but that was not D adhered to in the instant case (see paras 14, 16 & 19).

(2) Generally, an order of acquittal had to conform with s 173(f)(i) of the CPC when the prosecution had concluded its case and the court considered whether or not a prima facie case had been made out against E the accused. If no prima facie case had been made out, the court would order an acquittal pursuant to s 173(f)(ii) of the CPC. Hence, the earliest stage when the court could acquit an accused was after hearing all the evidence for the prosecution. But, in the instant case, the prosecution chose not to conclude its case but instead requested for a final F postponement of the trial. The trial judge apparently took the view that a DNAA order was proper as under the fairly-new s 254A of the CPC, the accused could be recharged for the same offences and his trial reinstated and continued from where it left off, when the prosecution was ready to proceed with the case. The trial judge, however, failed to consider that the G charges against the accused had been pending for more than two years since 2018 and he had been remanded in custody during that time and that if a DNAA was granted similar delays might recur if the prosecution reinstated the trial of the accused pursuant to s 254A of the CPC. This was fortified by the fact that since the order of DNAA was made, the H accused had not been recharged. In applying for the final postponement, the prosecution could not satisfy the court that the case would be proceeded with expeditiously. No information was given to the court on the attempts made to locate the prosecution witnesses and the reasons why they were always absent from trial (see paras 8 & 11–12). I

(3) Premised on s 173(c) CPC, read together with s 172B(4) of the CPC, it was apparent that the prosecution was unable to produce all evidence available to support its case against the accused as its witnesses chose to be absent without good reason. On that plank, the trial court ought to have

taken the position that the prosecution could not proceed with its case unhindered by unnecessary and unjustified postponements. The accused had legitimate expectation that his case would be fairly and speedily disposed of but the many postponements of his trial had gravely prejudiced him. His liberty had been curtailed because he had been remanded in custody since 2018 pending completion of the trial and the charges had been hanging over his head for more than two years (see paras 15 & 17).

(4) Although postponements of a trial were inevitable, it had to be with good reasons shown to the court. Once a trial date was set, be it for a fresh or part-heard hearing, it had to be proceeded with speedily in view of s 172B(4) of the CPC as well as the guiding time-line set to have criminal cases completed within a year from inception of trial. An expectation of a speedy trial also synced with s 173(c) of the CPC, which expressly provided that once an accused claimed trial to a charge, the trial court shall proceed to take all such evidence as might be produced in support of the prosecution speedily (see para 14).

[Bahasa Malaysia summary

Tertuduh (Goh Hwa Kiang) telah dituduh di mahkamah sesyen pada bulan September 2018 kerana memiliki senjata api dan kerana melakukan cubaan membunuh. Sementara menunggu perbicaraan, beliau telah direman dalam tahanan kerana jaminan tidak tersedia bagi kesalahan senjata api. Walaupun s 172B(4) Kanun Tatacara Jenayah ('KTJ') memperuntukan perbicaraan seorang tertuduh dimulakan tidak lebih dari 90 hari dari tarikh beliau dituduh, dalam kes semasa perbicaraan telah ditetapkan untuk berjalan pada April 2019 dan sebenarnya hanya berjalan pada bulan Julai 2019. Selepas itu, ia ditangguhkan beberapa kali atas permintaan pendakwaan kerana saksi-saksinya gagal hadir ke mahkamah. Setelah lebih dari dua tahun dari tarikh tertuduh didakwa, hanya empat saksi pendakwaan yang memberi keterangan dan kes pendakwaan masih belum selesai. Apabila, pada tarikh perbicaraan akhir pada 13 Julai 2020, pihak pendakwaan sekali lagi memohon penangguhan akhir kerana saksi-saksinya tidak hadir ke mahkamah dan sepina bagi kehadiran mereka belum dikeluarkan, peguam tertuduh membantah dan memohon permohonan pelepasan dan pembebasan. Namun, hakim perbicaraan, membenarkan tertuduh pelepasan tanpa pembebasan ('DNAA'). Oleh kerana DNAA bukanlah perintah muktamad, dan oleh itu tidak boleh dirayu, satu permohonan telah dibuat di Mahkamah Tinggi untuk menggunapakai kuasa semakannya atas keputusan tersebut berdasarkan s 323 KTJ yang dibaca bersama dengan ss 31 dan 35 Akta Mahkamah Kehakiman 1964.

Diputuskan, mengetepikan DNAA dan membebaskan dan melepaskan tertuduh:

(1) Hakim perbicaraan telah menggunakan budi bicaranya secara tidak wajar dengan tidak membebaskan tertuduh apabila melepaskannya. Dengan berbuat demikian, hakim telah salah arah pada undang-undang dan fakta kes. Hakim perbicaraan telah gagal untuk mempertimbangkan bahawa pertuduhan tersebut telah tergantung atas tertuduh selama lebih dari dua tahun dan yang mana beliau telah direman dalam tahanan; bahawa perbicaraan telah ditangguh berkali-kali kerana saksi pendakwaan tidak hadir tanpa alasan yang munasabah atas ketidakhadiran tesebut dan pihak pendakwaan masih jauh dari menutup kesnya. Berdasarkan fakta dan keadaan, keputusan hakim perbicaraan untuk memerintahkan DNAA adalah tidak tepat, tidak sah dan tidak wajar dan mengakibatkan ketidakeadilan yang memprejudiskan tertuduh dan menyebabkan beliau mengalami kesulitan yang tidak sepatutnya. Kelewatan pendakwaan tertuduh terjumlah kepada pendakwaan yang menyusahkan. Kepentingan awam menuntut agar seorang tertuduh harus dibicarakan dengan adil dan pantas, tetapi ianya tidak dipatuhi dalam kes semasa (lihat perenggan 14, 16 & 19).

(2) Secara umum, perintah pembebasan haruslah selaras dengan s 173(f)(i) KTJ apabila pihak pendakwaan telah menyelesaikan kesnya dan mahkamah telah mempertimbangkan sama ada suatu kes prima facie telah dibuat terhadap tertuduh ataupun tidak. Sekiranya tidak ada kes prima facie yang dibuat, mahkamah akan memerintahkan pembebasan berdasarkan s 173(f)(ii) KTJ. Oleh itu, peringkat paling awal apabila mahkamah boleh membebaskan seorang tertuduh adalah setelah mendengar kesemua keterangan pendakwaan. Tetapi, dalam kes semasa, pihak pendakwaan memilih untuk tidak menyelesaikan kesnya tetapi memohon penangguhan akhir perbicaraan. Hakim perbicaraan nampaknya mengambil pendekatan bahawa perintah DNAA adalah sesuai kerana di bawah s 254A KTJ yang baharu, tertuduh boleh dituduh semula atas kesalahan yang sama dan perbicaraannya dimulakan semula dan diteruskan di mana ia berhenti, apabila pihak pendakwaan sudah bersedia untuk meneruskan kes tersebut. Namun, hakim perbicaraan gagal mempertimbangkan bahawa pertuduhan terhadap tertuduh telah ditangguhkan selama lebih dari dua tahun sejak 2018 dan beliau telah direman dalam tahanan pada waktu itu dan bahawa sekiranya DNAA diberikan kelewatan yang serupa mungkin berulang sekiranya pihak pendakwa mengembalikan semula perbicaraan tertuduh berdasarkan s 254A KTJ. Ini diperkuat oleh fakta bahawa oleh kerana perintah DNAA telah dibuat, tertuduh tidak dituduh semula. Dalam memohon penangguhan takhir, pihak pendakwaan tidak dapat meyakinkan mahkamah bahwa kes tersebut akan diteruskan dengan pantas. Tidak ada maklumat yang diberikan kepada mahkamah mengenai percubaan untuk mengesan saksi pendakwaan dan alasan mengapa mereka selalu tidak hadir semasa perbicaraan (lihat perenggan 8 & 11–12).

(3) Berpandukan pada s 173(c) KTJ, dibaca bersama dengan s 172B(4) KTJ, ia adalah jelas bahawa pihak pendakwaan gagal untuk mengemukakan semua keterangan yang ada untuk menyokong kesnya terhadap tertuduh kerana saksinya memilih untuk tidak hadir tanpa sebab munasabah. Mengenai hal itu, mahkamah harus mengambil pendekatan bahawa pihak pendakwaan tidak dapat meneruskan kesnya tanpa dihalang oleh penangguhan yang tidak perlu dan tidak wajar. Tertuduh mempunyai jangkaan yang sah bahawa kesnya akan dilupuskan dengan adil dan pantas tetapi penangguhan perbicaraan yang terlalu banyak telah memprejudiskan beliau. Kebebasannya telah dikekang kerana beliau telah direman dalam tahanan sejak 2018 sementara menunggu perbicaraan selesai dan pertuduhan telah tergantung ke atas beliau selama lebih dari dua tahun (lihat perenggan 15 & 17).

(4) Meskipun penangguhan perbicaraan tidak dapat dielakkan, ianya haruslah dengan alasan yang baik yang ditunjukkan kepada mahkamah. Setelah tarikh perbicaraan ditetapkan, sama ada pendengaran baru atau pendengaran didengar sebahagian, ia harus diteruskan dengan pantas bersesuaian dengan s 172B(4) KTJ serta panduan garis masa yang ditetapkan bagi penyelesaian kes jenayah dalam masa setahun dari permulaan perbicaraan. Jangkaan bagi perbicaraan pantas haruslah selaras dengan s 173(c) KTJ, yang secara jelas memperuntukkan bahawa setelah seorang tertuduh menuntut perbicaraan atas pertuduhan, mahkamah hendaklah terus mengambil semua keterangan yang dikemukakan bagi menyokong pendakwaan tersebut (lihat perenggan 14).]

Cases referred to

Chu Chee Peng v PP [1973] 2 MLJ 35, FC (refd)
Emperor v Nasrullah And Ors AIR 1928 All 287, HC (refd)
Koh Teck Chai v PP [1968] 1 MLJ 166 (refd)
Kuppusamy v PP [1948] 1 MLJ 25 (refd)
Liaw Kwai Wah & Anor v PP [1987] 2 MLJ 69, SC (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311, SC (refd)
PP v Mohamed Said [1984] 1 MLJ 50 (refd)
PP v Mohd Jon [1993] 1 MLJ 133, HC (refd)
Ramanathan Chettiar v Sivarama Subramania ILR 47 Mad 722 (refd)
Tan Chow Cheang v PP [2018] 5 MLJ 411, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 31, 35
Criminal Procedure Code ss 128(1)(d), 172B(4), (5), 173(c), (f)(i), (f)(ii), (g), 254(2), (3), 254A, 259, 261, 316(c), 323, 325(1), 307(1)
Firearms (Increased Penalties) Act 1971 ss 8, 12
Penal Code s 307

Naran Singh (Naran Singh & Co) for the accused/applicant.
Azrul Faidz Abdul Razak (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Muniandy JC:

PREFACE

[1] This matter stems from an application for criminal revision. The law as found in s 323 of the Criminal Procedure Code (Act 593) ('the CPC') together with ss 31 and 35 of the Courts of Judicature Act 1964 (Act 91) ('the CJA') governs the exercise of revisionary jurisdiction by this court. Pursuant to s 323 of the CPC, it is duty of this court to see if an order made by the subordinate court is correct, legal or proper.

[2] If the order made is correct, legal or proper, it shall not be disturbed or altered. If otherwise, this court in its exercise of revisionary jurisdiction may alter or reverse the said order pursuant to s 316(c) of the CPC read together with s 325(1) of the CPC.

DISCHARGE NOT AMOUNTING TO AN ACQUITTAL

[3] The impugned order pertains discharge not amounting to an acquittal ('DNAA') allowed by the sessions court judge ('SCJ') in Taiping to the accused, Goh Hwa Kiang. He was charged on 29 July 2018 for two offences, allegedly committed on 19 July 2018, for possession of firearm under s 8 of the Firearms Increased Penalties Act 1971 (Act 37) ('the FIPA') and attempted murder under s 307 of the Penal Code (Act 574) ('the PC').

CASE CHRONOLOGY AND ORDER MADE BY SESSIONS COURT

[4] Pending trial, the accused was remanded in custody as offence for possession of firearm is unbailable pursuant to s 12 of the FIPA. The case had proceeded for trial with testimony of only four witnesses for the prosecution, thus far. There were numerous postponements of the trial granted by the court. It ranges from 30 October 2018–13 July 2020. On record, the accused was charged in court on 27 September 2018. Case management went ahead on 30 October 2018, 7 December 2018 and 8 February 2019. Trial of the case was scheduled on 23 and 24 April 2019, 10 May 2019, 24 and 25 July 2019. However, it commenced only on 24 July 2019. SP1 testified and had tendered the first information report, followed by SP2 the officer in charge of police station. Continuation of the trial was on 25 July 2019. SP2 continued with his testimony followed by SP3, a photographer. Trial was to continue on 9 September 2019, 14 October 2019 and 7 November 2019 but as no prosecution witnesses had turned up in court, it was postponed to 12 and 13

November 2019 when SP4, the investigation officer testified. Case was to continue on 11 and 23 December 2019 and 8 January 2020 but again it was not proceeded with, hence fixed for case management on 11 February 2020. Trial was to continue on 11 and 12 June 2020 but again postponed due to Covid-19 pandemic resulting in Conditional Movement Control Order. After which, trial of the case was to continue on 13 and 14 July 2020.

[5] Since the accused was charged in court on 27 September 2018, the trial shall commence not later than 90 days from that date. This is provided for in s 172B(4) of the CPC. But the first date of trial was fixed way after the 90 days on 23 and 24 April 2019. Although the trial did not commence according to the time period specified, it does not invalidate the charge or prosecution against the accused or could form as basis for post-trial procedures (see s 172B(5) of the CPC). However, the sessions court is expected to follow the time period specified so as to accord a fair and speedy trial to the accused person. This is not done.

[6] After a period of two years, on 13 July 2020, the deputy public prosecutor ('DPP') conducting prosecution of the case had informed the SCJ the following:

> Tiada saksi pendakwaan hadir pada hari ini. Sapina kepada saksi tidak dipohon oleh IO yang sudah bertukar. Tiada tindakan diambil. Pendakwaan akur tiada saksi hadir, pohon satu tarikh akhir jika diizinkan.

From her submission, it is apparent that the DPP did not intend not to prosecute the accused further on the charge, pursuant to s 254(2) of the CPC. If she had intimated so to the court, s 254(3) of the CPC would have been invoked by SCJ, who then would have either ordered a discharge not amounting to an acquittal (DNAA) or discharge amounting to an acquittal ('DAA'), in favor of the accused. The application by the DPP is for a final postponement of the trial, presumably anchored on s 259 of the CPC, albeit not specifically stating so. However, her application indicates that she is fully aware that the case had been postponed numerous times.

[7] Reacting to the application by DPP, defence counsel ('DC') representing accused, had instead applied for an order of DAA, which left the SCJ in a quandary. Basis for application by DC was s 173(g) of the CPC, which allows the court to discharge an accused, if the charge against him is groundless. According to Mohamed Azmi J (as he then was), in the case of *Public Prosecutor v Mohamed Said* [1984] 1 MLJ 50, 'groundless' means 'destitute of foundation, authority or support; having no real cause or reason; unfounded'. His Lordship had said that to his mind, merely because the prosecution has failed to exercise due diligence in tracing certain material witnesses does not render the charge

groundless. Hence, this court is of the view that s 173(g) of the CPC is inapplicable. There is no material before the court to demonstrate that the charge preferred against accused is groundless. To the contrary, the charges against him are for offences known under the law and it is well-founded, since trial of the case had proceeded with testimony of four prosecution witnesses.

[8] Against that backdrop, the SCJ is left only with two alternatives, to either allow a postponement of trial pursuant to s 259 of the CPC or to acquit the accused person, as prayed for by the DC. However, an order of acquittal has to be in conformity with s 173(f)(i) of the CPC, when case for the prosecution is concluded and the court shall consider whether the prosecution has made out a prima facie case against the accused. Sequentially, if the court finds that the prosecution has not made out a prima facie case against the accused, the court shall record an order of acquittal pursuant to s 173(f)(ii) of the CPC. Hence, the earliest stage at which the court can acquit an accused person is after hearing all the evidence for the prosecution (see the case of *Kuppusamy v Public Prosecutor* [1948] 1 MLJ 25; *Chu Chee Peng v Public Prosecutor* [1973] 2 MLJ 35). But the situation in the present case is that the DPP chose not to conclude case for the prosecution but had instead requested for a final postponement of trial. *Can the court acquit the accused person?*

[9] The SCJ decided to discharge the accused and not to acquit him of the charges. Thus an order of DNAA is made against accused. The DC was dissatisfied with the order made and had pursued with an appeal against the said order pursuant to s 307(1) of the CPC. It was later withdrawn. Rightly so, since an order of DNAA is not final and conclusive, finally disposing of rights of parties pursuant to s 3 of the Courts of Judicature Act 1964 (Act 91) ('the CJA'). It was so decided by the Court of Appeal in the case of *Tan Chow Cheang v Public Prosecutor* [2018] 5 MLJ 411, rendering an order of DNAA not an appealable order. Basis being, the prosecution, once ready to proceed with case against accused, would be able to recharge accused for the same offence and his trial shall be reinstated and continued as if there had been no such order given. This is made possible by s 254A of the CPC.

GROUNDS FOR THE ORDER OF DNAA AND ANALYSIS

[10] Since an appeal had been lodged, the SCJ prepared and provided his grounds of judgment (GOJ), he reasoned out the basis for the order of DNAA as following:

> ... Perintah Mahkamah melepaskan tanpa dibebaskan (DNAA) mempunyai definisi bahawa OKT dilepaskan daripada pertuduhan di mana OKT boleh dituduh semula dengan pertuduhan yang sama pada masa akan datang apabila pihak Pendakwaan boleh memutuskan berbuat sedemikian atas sebab-sebab tertentu. Dalam kedua-dua kes ini pihak Pendakwaan tidak memohon kepada Mahkamah

untuk perintah OKT dilepaskan tanpa dibebaskan (DNAA), sebaliknya Mahkamah membuat keputusan setelah kedua-dua pihak berhujah sama ada OKT dilepaskan dan dibebaskan (acquitted and discharged) atau dilepaskan tanpa dibebaskan (DNAA) setelah pihak Pendakwaan gagal meneruskan perbicaraan pada tarikh tersebut setelah tiada seorang pun saksi Pendakwaan yang hadir ...

[11] It would seem, albeit reference to ss 173(g) and 259 of the CPC, the SCJ did not consider those statutory legal provisions when discharging the accused of the charges. His utmost consideration was that the discharge is only proper as the accused could be recharged if the prosecution is ready and chooses to proceed with case against him. Section 254A of the CPC was referred to. That provision, which is fairly new to the CPC, allows for reinstatement of charge against accused, after being discharged of the same, thus continuing the case from where it ceased before an order of discharge was made. The provision is made to cater to the volume of cases, wherein accused persons were granted DNAA for a myriad of reasons, including situation like in the present case wherein prosecution is not ready to proceed with case against accused as its witnesses are not available in court to testify on its behalf. Thus to save the work done, vide prosecution of the accused in court, the law allows for such an avenue, in order to save time and expense, so that trial of the case is reinstated.

[12] The pivotal issue arising thereon is did the SCJ consider fully the circumstances of the case, especially when the charges against accused had been pending since year 2018. Further, he had also been remanded in custody pending trial for two years. The SCJ ought to be mindful of the fact that a similar situation may recur, if the prosecution reinstates the trial of the accused person pursuant to s 254A of the CPC. It is fortified by the fact that since the order of DNAA on 13 July 2020, the accused had not been recharged. The DPP having conduct of the case, when applying for postponement of trial on 13 July 2020, was unable to satisfy the court that the case would be proceeded with, once postponement was obtained and within a reasonable time. She chose not to be forceful in her application, but rather feeble when she merely informed the court 'Pendakwaan akur tiada saksi hadir, pohon satu tarikh akhir jika diizinkan'. She did not implore the court, on attempts made or having made to locate the prosecution witnesses soonest and continue with the case of prosecution, to avoid further delay. No material was placed before the court as to whereabouts of the witnesses and why they were absent for trial. There is no semblance of regret shown as to the delay in procuring the said witnesses albeit the fact that trial of the case was underway since 2018. This case had been partly heard by an earlier SCJ, and to be continued by her successor. She could have utilised s 261 of the CPC to her advantage by having to recall prosecution witnesses whom had testified, if it has to be so in order to secure a final postponement. All that is required is a forceful submission with a cogent basis. She could have related to the disadvantage faced by the succeeding SCJ of not having the means of assessing demeanor of witnesses who had testified and that

there is always an avenue to recall witnesses or a trial de novo (see the case of *Public Prosecutor v Mohd Jon* [1993] 1 MLJ 133). Moreover, no good cause was shown to court for postponement of case, considering the stark fact that there were a series of postponement granted. The DPP ought to have informed the court of reasons for absence of prosecution witnesses for the trial as it had not been for the first time. The reasons would be material considering the status of the accused person who had been remanded in custody pending trial. Likewise, the SCJ should have requested for the reasons as expected under s 259 of the CPC before considering to either discharge or acquit the accused person of the charges. All these factors cumulatively demonstrate *dilatoriness* on the part of prosecution to proceed with case fairly and speedily.

FINDINGS AND CONCLUSION

[13] At this juncture, what comes to my mind is the case of *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166 at p 167, which cannot be missed in its application. In that case, His Lordship Ong Hock Sim J, had decided the following:

> This power enabling the discharge of an accused person without acquitting him is a power which should be exercised sparingly and grudgingly and only where the court is satisfied for good cause shown that the public interest insistently demands that it be used. Our courts have consistently adopted the line that unless some very good ground is shown it would not be right to leave an individual for an indefinite period with a charge hanging over him.
>
> If the prosecution are not ready to proceed with their case after reasonable adjournments have been granted, (as in the present case) an accused person should not be allowed to suffer from the dilatoriness of the prosecution by being left with a charge hanging over his head indefinitely (likewise in the present case).

[14] In view of the foregoing, I have decided that there has been an improper exercise of discretion by the SCJ to have only discharged the accused person and not to acquit him of the charges. By doing so he has misdirected himself on the law and facts of the case. The improper exercise of discretion ensues because, the SCJ had erred when he did not consider a serious issue that the accused person was in fact remanded in custody pending trial; the numerous times postponement of the case had been granted and yet the witnesses for the prosecution did not turn up in court to testify; no cogent reasons were given for their absence in court; the case was at the prosecution stage being still far away from closure before an order is made at end of the case of prosecution. The foremost consideration by the SCJ has to be, once the case is set down for trial, it has to proceed unhindered. Although postponement is inevitable, but it has to be with good reasons shown to the court. Once a trial date is set, be it fresh or part-heard hearing, it has to proceed speedily in view of s 172B(4) of the CPC as well as the guiding time line set to have criminal cases completed

within a year from inception of trial. An expectation of a speedy criminal trial also syncs with s 173(c) of the CPC, which expressly provides that once an accused person claims trial to a charge, the trial court shall proceed to take all such evidence as may be produced in support of the prosecution speedily. In the present case scenario, the accused had claimed trial to the charges levelled against him since the year 2018, but the prosecution had been tardy in prosecuting him speedily. Instead a series of postponements were requested on the same ground that witnesses for the prosecution are not present in court to testify, but for how long?

[15] Premised on s 173(c) of the CPC, it is apparent that prosecution is unable to produce all evidence available to support its case against the accused person, for the court to proceed with the trial. Section 173(c) of the CPC has to be read harmoniously with s 172B(4) of the CPC. Both provisions pertain to the criminal trial process. It would be the legitimate expectation of the accused person to have his case fairly and speedily disposed of. What matters most is the fact that the charges have been hanging over the accused for a long period of time. It does not matter if the accused person had been released on bail pending trial or remanded in custody pending trial (as in the present case). What matters most is the fact that charges levelled against the accused had been hanging over his head and to be tried speedily. In the present case, it is apparent on the face of record that the prosecution is unable to produce all evidence in support of its case to the court against the accused as its witnesses chose to be absent without any good reasons. On that plank, the trial court ought to have taken the position that prosecution could not proceed with the case unhindered and the charges are hanging over the head of the accused person for an inordinate period of time, since the date of charge on 27 September 2018.

[16] Ensuing from the above, the order of DNAA made, in terms of s 323 of the CPC is both incorrect and illegal under the law and improper too according to the facts and circumstance of case. The overwhelming consideration shall be public interest, demanding for the accused to be prosecuted fairly and speedily. That has not been adhered to at all material times, when the trial of the case was underway.

[17] In this regard, the speech by our Chief Justice when she was making her opening remarks on 29 March 2021 at an Induction Programme at the Palace of Justice, to welcome newly appointed judicial commissioners is referred. Her Ladyship had remarked by saying that in conducting criminal cases, the words of the then Chief Justice of Canada, the Right Honourable Beverly McLachin is brought to attention, who had said:

> There is an obvious tension between the rights that are essential to a fair criminal trial, and the expectation that may sometimes arise on the part of the complainants. And the criminal law must navigate this tension.*But it can only do so effectively if all*

> *sides have realistic expectations about what the criminal process can and cannot do.* Complainants and witnesses need to understand what is required of them in a trial and what they can realistically expect from it. No one has a right to a particular verdict, but only to a fair trial on the evidence. (Emphasis added.)

Reference to fair trial includes a speedy trial unhindered without unnecessary and unjustified postponement. That is the realistic expectation of all the parties to this criminal proceeding which includes the court, prosecution and accused. Postponements granted in this case throughout by the SCJ had prejudiced the accused person as he had been remanded in custody since 19 July 2018. With the multitude postponements, at the request by prosecution, his liberty has been further curtailed. The sole ground being that witnesses are unavailable in order to proceed with the case. They seem to be absent. The prosecution did not pay heed to their due presence in court for trial on dates fixed by court beforehand. The case had then sauntered into the pandemic, whereby court hearings with physical presence of all parties came to a halt. But when the court was ready to proceed, the DPP had repeatedly applied to have the case postponed by merely informing the court that witnesses are not available as subpoena was not applied for, to have them directed to attend court. The record too does not show if the said subpoena had been served on the witnesses or otherwise. To reiterate, this demonstrates the lukewarm position taken by prosecution to have the case against accused speedily prosecuted. It is fortified by the fact that even on 13 July 2020, when the DPP sought postponement, she had stated 'pendakwaan akur tiada saksi hadir, *pohon satu tarikh akhir jika diizinkan*' (Emphasis added.). Hence, if the court is not with prosecution to allow the postponement, the prosecution is willing to subject itself to any order made by the court. Logically, the order could either be a DNAA or even DAA. This too implies that the prosecution is not ready to adduce all evidence in support of its case against the accused pursuant to s 173(c) of the CPC. The case had dragged on for more than two years and still unresolved but pending at the prosecution stage. It was for that reason, such an instance is described as *dilatoriness* in the case of *Koh Teck Chai,* alluded to above.

[18] It is apparent from the record, that the prosecution is not ready to proceed with case against accused, from its inception until the order of DNAA was handed down. As such, it ought to have gracefully withdrawn the charges against him and request for a DNAA at once instead of leaving it to the court to decide. But since the decision was left to the court, public interest demands for the court being the bastion and last port of call of justice, to be vigilant in safeguarding interest of the accused, against whom the charges has been pending for a very long time, and remanded in custody pending trial of the case. The court is not subject to the dictates of the prosecution, once it has taken cognisance of the offence committed by the accused pursuant to s 128(1)(d) of the CPC, when he was brought to court to be charged, on

completion of remand period pending investigation against him. The court would then take full charge and control of the criminal proceeding. It is bestowed with jurisdiction to grant the necessary and appropriate order so as to ensure justice is served, materially so to the accused person, since he had been remanded in custody pending trial. At this juncture, it is prudent to refer and quote dictum of His Lordship Mohd Azmi FCJ (as he then was), forming part of the majority judgment of Supreme Court in the case of *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 at p 323, where His Lordship decided that:

> ... the normal legal position was that once the court had taken cognizance of the offence and was seized with jurisdiction to try the case, the institution of the proceedings by the Public Prosecutor was complete, because not only had the Public Prosecutor successfully invited the court to take action, but also it was the scheme of the Criminal Procedure Code that trial follows cognizance and cognizance would be preceded by investigation. Criminal proceedings are in fact not instituted until the court has taken cognizance of the offence or offences under one or other of the clauses of sub-s (1) of s 128 CPC, a host of judicial powers will flow to enable the court to proceed to trial and determine the dispute between the parties in accordance with law. In general, the court taking cognizance of the offence, is the dividing line between the sphere and domain of the executive and the judiciary, for cognizance by the court signals the submission of the executive to the jurisdiction of the court and marks the completion of the exercise of executive power to 'institute' the criminal proceedings. From then on, the whole conduct of the proceedings should be within the exclusive judicial power of the court until its conclusion ...

[19] In the upshot, since the trial court chose not to grant an order of DAA to the accused, this court in its exercise of revisionary jurisdiction corrects the miscarriage of justice which had prejudiced the accused person and had caused him undeserved hardship. In the case of *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69, the Supreme Court discussed at length the powers of revision exercisable by the High Court. On the object of revision, it quoted the Indian case of *Emperor v Nasrullah And Ors* AIR 1928 All 287 which says that the object of revisionary powers is:

> To confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals.

In this case too, the accused has been subjected to inordinate delay in prosecuting him which tantamount to a vexatious prosecution (see the case of *Ramanathan Chettiar v Sivarama Subramania* ILR 47 Mad 722). Flowing from that, the order of DNAA by the SCJ is now set aside and substituted with an order of discharge amounting to an acquittal (DAA) pursuant to s 325(1) of the CPC. In accordance with the facts and circumstances of the case which had militated against the accused, the order of DAA is thus correct, legal, proper

and justified. The accused is hereby acquitted and discharged of the charges against him.

Accused acquitted and discharged.

DNAA set aside; accused acquitted and discharged.

Reported by Ashok Kumar